**BERNARD THOMAZIOS** A

**v.**

**THARMARAJ AYADURAI & ORS**

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL ALIM ABDULLAH JC
[CIVIL SUIT NO: D3-22-1158-2004]
16 MARCH 2007

***CIVIL PROCEDURE:*** *Action - Disposal of case on point of law - Application under O. 14A and/or O. 33 r. 2 Rules of the High Court 1980 - Preliminary question of law or construction of document - Determination by the court - Whether third defendant's letter tantamounts to an undertaking - Validity and enforceability of undertaking expressed - Whether a mixed question of fact and law - Whether best determined at trial - Whether there were triable issues - Whether O. 14A applicable* C D

This was an application by the third defendants for leave to try a preliminary question of law or construction of a document pursuant to O. 14A and/or O. 33 r. 2 of the Rules of the High Court 1980. The third defendants sought the following order for determination by the court as to whether the third defendants' letter dated 31 January 1996 ('the third defendants' letter) tantamounts to an undertaking to be determined without the full trial of the action. The relevant letter of the third defendants that was alleged to have given rise to the dispute herein was reproduced before the court and it was not denied that the signatory to the said letter, one Deepa Anna Vargis, was a partner of the third defendants. It was the plaintiff's claim that he had loaned RM650,000 to the first defendant. Based on the letter issued by the third defendants, the plaintiff claimed against the firm contending that the purported assurance given by it tantamounts to an undertaking to pay the said sum. The plaintiff submitted that the question of law sought to be determined summarily by the third defendants was not suitable to be determined without the full trial of the action. At the hearing of the above application by the third defendants, it was dismissed. The latter appealed. The third defendants argued that the words therein stated by no means indicated that the firm undertook to pay the sum of RM650,000. The third defendants further argued that all the letters that were written by one Deepa Anna Vargis, in particular the one in issue, did not bear out or make plain that the third E F G H I

A defendants had warranted to pay the monies to the plaintiff. The plaintiff, however, submitted that in accepting the undertaking given by the third defendants in its letter of 31 January 1996, had fully relied on the representations made by the said Deepa Anna Vargis as a partner of the firm.

B

**Held (dismissing third defendants' application with costs):**

**(1)** The third defendants in their defence had claimed that Deepa Anna Vargis had given the undertaking in her personal capacity. This obviously would require her evidence in a trail, one which would be quite telling yet significant too of what the letters would speak of. This extrinsic evidence by Deepa Anna Vargis was crucial. The court ought not to summarily decide without the benefit of the evidence of Deepa Anna Vargis who was not a party to the proceedings. The validity and enforceability of the undertaking expressed in the letter dated 31 January 1996 was a mixed question of fact and law that could be best determined at trial and not under O. 14A and/or O. 33 r. 2 of the Rules of the High Court 1980. (para 10)

**(2)** The third defendants by their very application had invited the court at the outset to determine that there was no liability on their part and that the subject matter of the letter of 31 January 1996 had been duly proved or admitted. This was absurdly fanciful as the admissibility of the purport and contents of the said letter would be the subject of the crucial evidence of its writer, Deepa Anna Vargis, a non-party to the action and who was a fitting witness for the third defendants at the trial. (para 13)

**(3)** The evidence of Deepa Anna Vargis was, to say the least, not only extrinsic yet crucial but also adducible at the trial of this action. That being so, it must not therefore favour a summary determination now as sought by the third defendants. There were triable issues that surrounded the question of the undertaking which was vigorously disclaimed by the third defendants. The risk in allowing this application by way of O. 14A than to go for trial was manifest. That application could not and must not proceed if there were facts in dispute. (paras 15, 16 & 17)

**(4)** The order sought by the third defendants only allowed the court to determine issues of law where the facts were not in dispute. If the primary facts that were necessary for the determination of the question of law were in contention, then O. 14A was not applicable. The issues of facts must be decided based on evidence of witnesses who could testify to the existence of those primary facts. (paras 17 & 19)

**(5)** The application before the court was unquestionably not one to grant the orders as prayed for by the third defendants. Devoid of facts that would be established by extrinsic evidence on the very subject matter of the undertaking, this court should not act *in vacuo*. (para 18)

**Case(s) referred to:**

*Amit Salleh & Ors v. The Superintendent, Land and Survey Department Bintulu & Ors (Civil Suit No: 22-21-2000) (Unreported)* ***(refd)***

*Bank of India v. Murjani Marketing (CA Transcript 91/0304)* ***(refd)***

*Chan Kum Loong v. Hii Sui Eng [1980] 1 MLJ 313* ***(refd)***

*Fraser & Neave Ltd & Ors v. Aberdeen Asset Management Asia Ltd & Anor [2002] 4 SLR 473* ***(refd)***

*Korso Finance Establishment Anstall v. John Wedge (CA Transcript No. 94/387)* ***(refd)***

*Sumner v. William Henderson and Sons [1963] 1 WLR 823* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 14A, O. 33 r. 2

**Other source(s) referred to:**

*Malaysian High Court Practice*, 2004 edn, para 14A.1.3

*For the plaintiff - Pradeep Kumar; M/s Syarikat KL Rekhraj*
*For the 3rd defendants - Mohd Faizul Lasri; M/s Kris, Edward & Derek*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Abdul Alim Abdullah JC:**

**[1]** This is an application by the third defendants for leave to try a preliminary question of law or construction of a document pursuant to O. 14A and/or O. 33 r. 2 of the Rules of the High Court 1980.

**[2]** The third defendants seek the following orders for determination by the court:

(a) That whether the Third Defendants' letter dated 31.01.1996 tantamounts to an undertaking be determined without the full trial of the action;

(b) If the answer is not in the affirmative, this action against the Third Defendants be dismissed.

**[3]** At the outset it was submitted by counsel for the plaintiff that no prior leave had been obtained for the said application and it should not be entertained. The court rejected this argument quite simply as no such provision is made for that requirement under both O. 14A or O. 33 r. 2 of the Rules of the High Court.

**[4]** The relevant letter of the third defendants dated 31 January 1996 that is alleged to have given rise to the dispute herein is reproduced below to better appreciate its contents with reference to the determination sought by the third defendants:

| | |
|---|---|
| Zaitoon Othman & Associates | ADVOCATES & SOLICOTORS<br>PEGUAMBELA & PEGUAMCARA<br>6th Floor UMBC Tower Annexe,<br>Jalan Sultan Sulaiman<br>50000 Kuala Lumpur |
| Partners: | Tel: 03-2748699, 2748672, 2748673 |
| Zaitoon bte Dato Othman<br>Of Lincoln's Inn, Barrister<br>Commissioner for Oaths | Fax: 03-2748404 |
| Rozana bte Ismail<br>LLB (Hons) Malaya | Our Ref:<br>VBB/C/1346/95(MISC)(D) |
| Deepa Anna Vargis<br>LLB (Hons) Wales, CLP | |
| 31st January 1996 | |
| Bernard Thomazios<br>No. 6, Jalan Setia Bakti 9<br>Bukit Damansara<br>50490 Kuala Lumpur | |

Dear Sirs,

**Re: Loan Agreement Dated 2nd November 1995 Loan Amount: RM450,000.00 Additional Loan Facility: RM250,000.00**

1. Reference to the above matter and to the above mentioned Loan Agreement and Additional Loan Facility.

2. Our Client, Volcart Bintang Sdn Bhd through Mr. Tharmaraj instructs us to inform you that they will be receiving a substantial amount of monies by the 26th February, 1996 which monies our client intends to use for the purposes of settlement of the outstanding due and owing by our clients to yourselves.

3. Upon receipt of the monies by our client, we undertake to inform you of the same and through this letter we further assure you that the monies owing under the above mentioned Loan Agreement amounting the sum of RM650,000.00 shall be paid immediately to yourselves before the 28th February, 1996.

Thanking You.

Yours faithfully

Sgd
Deepa Anna Vargis

disk:ws7/UBB-1334
DAV/su.

**[5]** It is not denied that the signatory to the above letter, one Deepa Anna Vargis was a partner of the third defendants and also, at that material time was the wife of the 1st defendant, Tharmaraj Ayadurai a/l Ayadurai. The plaintiff claims that he had loaned RM650,000 to the first defendant (para 14(b) of the statement of claim). Based on the above letter issued by the the third defendants, the plaintiff claims against the firm contending that the purported assurance given by it tantamounts to an undertaking to pay the said sum of RM650,000. Counsel for the plaintiff submitted that the question of law sought to be determined summarily by the third defendants is not suitable to be determined without the full trial of the action.

**[6]** At the hearing of the above application by the third defendants, it was dismissed with costs. The latter appealed.

**[7]** It is useful to make reference here of the requirements that must be fulfilled in an application under O. 14A. They are the following:

(a) the question of law or construction is suitable for determination without the full trial of the action: r. 1(1)(a):

(b) such determination will be final as to the entire cause or matter or any claim or issue therein: r. 1(1)(b); and

(c) the parties have had an opportunity of being heard on the question: r. 1(3).

**[8]** In this action much turns upon the crucial third paragraph of the letter of the third defendants dated 31 January 1996.

**[9]** Counsel for the third defendants argued that the words therein stated by no means indicate that the firm undertook to pay the sum of RM650,000. In support of his argument two earlier letters of the third defendants addressed to the plaintiff indicating that the former was only acting for its client (the first defendant) and no more, and likewise in accepting two other loan sums (RM375,000 and RM400,000) respectively which it had received from the plaintiff. In the same way counsel also drew attention of the court another letter (post 31 January 1996) indicating the same. All the above letters were exhibited in the affidavit in support of the application (exhs. ZO1, ZO2, ZO3 and ZO4 refer). To put it simply, learned counsel argued that all the letters above that were written by Deepa Anna Vargis in particular the one in issue did not bear out or make plain that the third defendants had warranted to pay the monies to the plaintiff.

**[10]** Now, this is what the plaintiff's counsel had to respond. He submitted that the plaintiff in accepting the undertaking given by the third defendants in its letter of 31 January 1996 had fully relied on the representations made by the said Deepa Anna Vargis as a partner of the firm. Not only that, it was also shown that the third defendants in their defence had claimed that Deepa Anna Vargis had given the undertaking in her personal capacity (paras 5, 7, 8 and 9 of the statement of defence refer). This obviously would require her evidence in a trial, one which would be quite telling yet significant too of what the letters would speak of. This extrinsic evidence by Deepa Anna Vargis is crucial. The court hence ought not summarily decide without the benefit of the

evidence of Deepa Anna Vargis who is not a party to the proceedings. The validity and enforceability of the undertaking expressed in the letter dated 31 January 1996 is a mixed question of fact and law that could be best determined at trial and not under O. 14A and/or O. 33 r. 2 of the Rules of the High Court 1980.

**[11]** I find reasons that favour the arguments put into view by counsel for the plaintiff.

**[12]** A passage in the *Malaysian High Court Practice* 2004 Edition at para 14A.1.3 states as follows:

> The question of law or construction must be suitable to be determined without the full trial of the action. *The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question.* The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action. For example see *Manganmal Jhamatmal Lalwani v. NE Vickerama* [2001] 1 SLR 90 (where the plaintiff made an application for a ruling on the preliminary issue as to whether there was an issue estoppel).
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> In cases where all the relevant evidence is before the court, and where the point of law depends entirely on the construction of relevant documents in their context and it is not suggested that any further evidence could be available, it would be appropriate for the question to be dealt with under O. 14A rather than to allow it to go to trial. (emphasis added).

**[13]** In the present case, the third defendants by their very application has invited this court at the outset to determine that there is no liability on their part and that the subject matter of the letter of 31 January 1996 has been duly proved or admitted. This is absurdly fanciful as the admissibility of the purport and contents of the said letter would be the subject of the crucial evidence of its writer, Deepa Anna Vargis, a non-party to the action and who is a fitting witness for the third defendants at the trial.

**[14]** In the English Court of Appeal decisions some basic principles have been laid down in deciding O. 14A applications. In the case of *Korso Finance Establishment Anstall v. John Wedge* (unreported, 15 February 1994, CA Transcript No. 94/387) Sir Thomas Bigham MR expressed unease at deciding questions of legal principle without knowing the full facts. For this court to decide on the issues posed by the third defendants would be presumptious of some proven facts which if entertained would appear hypothetical. This is unacceptable as expressed in *Sumner v. William Henderson and Sons* [1963] 1 WLR 823. Further in our Federal Court, in the case of *Chan Kum Loong v. Hii Sui Eng* [1980] 1 MLJ 313 at p. 314 Chang Min Tat FJ (as he then was) said:

> In the ordinary course of events, a preliminary point of law which does not decide the matter between the parties one way or the other is an unjustified waste of time and occasions an equally unjustified increase in costs. Preliminary points of law have been described as too often treacherous short cuts and their price can be delay, anxiety and expense: see *Tilling v. Whiteman* [1979] 2 WLR 401 per Lord Wilberforce at page 403 D-G and per Lord Scarman at page 410 C-E. But where it is a trial of so-called preliminary issues of fact, the justification is even harder to see. This is more so, where the facts as found here on these two preliminary issues were not seen to be as they rightly are, the bases for the judgment that was delivered and the answers to the prayers sought by the respondent. For ourselves we have read the evidence that was led in the earlier action on these preliminary issues and have thought that it was sufficient to enable the whole action to proceed to a conclusion. This must be the reason why eventually after a delay and some anxiety, when the later action came up for trial (without the earlier action having been proceeded with), the parties agreed that this evidence should form part of the record. Only the respondent called further evidence from her husband who should have been called to give evidence in the preliminary issues since he was at all times the respondent's agent.
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> We think it should be said with some emphasis that counsel owe a plain duty to the court for it to function expeditiously, economically and satisfactorily. They must therefore so conduct their case as to enable the court to come to a quick and early decision. The court must also be chary of short-cuts and not be tempted to undertake any course except the one for a proper, expeditious and economical trial on the issues raised in the action.

**[15]** In agreeing with the plaintiff counsel's contention that this instant case involves the validity and enforceability of the alleged undertaking being a mixed question of fact and law, I am reminded of what was stated in *Bank of India v. Murjani Marketing* (1 March 1991, CA Transcript 91/0304) where Taylor LJ expressed that where issues of fact are interwoven with legal issues raised it would be undesirable for the court to split the legal and factual determination, for to do so would in effect be to give legal findings *in vacuo* or on a hypothetical ruling, which the court will not do.

**[16]** Suffice to add and say further that the evidence of Deepa Anna Vargis is to say the least not only extrinsic yet crucial but also adducible at the trial of this action. That being so it must not therefore favour a summary determination now as sought by the third defendants (see *Fraser & Neave Ltd & Ors v. Aberdeen Asset Management Asia Ltd & Anor* [2002] 4 SLR 473).

**[17]** It is further observed that this suit was filed in 1999 and the instant application herein was only thought of and filed on 10 April 2006, that even so after the third defendant was unsuccessful in its third party proceedings against Deepa Anna Vargis and in which there is no appeal therefrom. The dismissal of the latter proceedings, not to mention similarly too, the earlier O. 14 application, filed by the plaintiff in good time then, bear relevance to the fact that there are triable issues that surround the question of the undertaking now vigorously disclaimed by the third defendants. This court must not pre empt the testimony of Deepa Anna Vargis. She is a compelling witness for the defence at the hearing of the suit which is now already fixed for trial. The risk in allowing this application by way of O. 14A than to go for trial is manifest. That application cannot and must not proceed if there are facts in dispute. The order sought by the third defendants only allows the court to determine issues of law where the facts are not in dispute. If the primary facts that are necessary for the determination of the question of law are in contention, then O. 14A is not applicable. This is so because the issues of facts must be decided based on evidence of witnesses who can testify to the existence of those primary facts – see *Amit bin Salleh and 2 Others v. The Superintendent, Land and Survey Department Bintulu and 2 Others* Civil Suit No. 22-21-2000 High Court Sabah and Sarawak.

**[18]** In the obvious circumstances of the application before me now it is unquestionably not one to grant the orders as prayed for by the third defendants. Devoid of facts that would be established by extrinsic evidence on the very subject matter of the undertaking, this court is lame and shall not act *in vacuo*.

**[19]** The application by the third defendants in encl. 89 is requisitely dismissed with costs.